Supreme Court, U.S.
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No. 92-956

IN THE SUPREME COURT
OF THE UNITED STATES

THE CITY OF NEW YORK,

Petitioner,

- against -

JAMES WALKER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. THE ALLEGATIONS IN THE AMENDED COMPLAINT ARE NOT SUFFICIENT TO WITHSTAND DISMISSAL UNDER THE FIFTH CIRCUIT'S "HEIGHTENED" PLEADING STANDARD CURRENTLY UNDER REVIEW BY THIS COURT.

(1)

As set forth on page seven (7) in footnote five (5) of respondent's brief in opposition to the petition for a writ of certiorari ("Resp. Br."), respondent concedes that his perjury claims, against both the police and the prosecutor, would probably not survive a motion to dismiss under the "heightened" pleading standard for Monell §1983 claims currently under review by this Court in the case of Leatherman v. Tarrant Co. Narcotics Intelligence Unit, 954 F.2d 1054 (5th Cir., 1992), cert. granted, 112 S.Ct. 2989 (June 22, 1992). While petitioner believes that this case merits full review, in light of respondent's concession, at the very least the petition should be held in abeyance pending determination of Leatherman and, should the "heightened" pleading standard of Leatherman be adopted, so much of the judgment of the Court of Appeals as failed to dismiss the perjury claims should be vacated.

(2)

Respondent is incorrect when he argues that the allegations in the amended complaint against the Kings County District Attorney's Office ("DA's Office) are sufficient to withstand a motion to dismiss a Monell §1983 claim for failure to train or supervise. As established by this Court in City of Canton, Ohio v. Harris, 489 U.S. 378 (1989), municipal liability for failure to train or supervise will lie only where the failure amounts to "deliberate

indifference" to people's constitutional rights. Id. at 388, 389, 392. "Deliberate indifference" is established by demonstrating "a 'deliberate choice to follow a course of action made from among various alternatives' by city policymakers". Id., at 389 (citation omitted). This can be done by alleging either: (i) facts which show that the need was so obvious because the lack of training or supervision would be so likely to result in a violation of constitutional rights; or (ii) a pattern of prior incidents of misconduct that would put the municipality on notice that there was such a need. Id. at 396-397, (O'Connor, J., concurring).

Respondent's amended complaint is devoid of any allegations demonstrating a pattern that the DA's Office failed to turn over Brady material to defense counsel other than in this one instance (see amended complaint, pp. 1a-17a, annexed as Appendix A ["Appendix A"] to Resp. Br.).

Moreover, nowhere in respondent's amended complaint did he allege that, at the time of his arrest or trial, the Brady decision was so new and so important that it should have been obvious to the DA's Office that it was necessary to train its staff on the requirements of Brady, beyond what they had learned in law school and needed to know in order to pass the bar examination (see Appendix A at 1a-17a). Indeed, the Brady decision was not so new; it had come down in 1963, whereas respondent's arrest and trial had occurred some eight years later in 1971 (see Appendix A at 4a, 9a). Nor did respondent allege any

other facts which would show that the need for such training was "obvious" at that time. The fact that subsequent to this case supervision concerning Brady issues was instituted by the DA's Office (see Resp. Br. at 6), does not mean that, prior to the incident alleged herein, there had been any pattern of incidents that should have put the DA's Office on notice or that the need for such training was obvious.

Accordingly, respondent's claim against the DA's Office would not withstand a motion to dismiss, particularly under the fifth circuit's heightened pleading standard, because this Court has made clear that mere lack of training in a particular area, in and of itself, is insufficient to make out a claim for municipal liability. City of Canton, Ohio v. Harris, supra, 489 U.S. at 389-392.

II. RESPONDENT'S ARGUMENT, THAT THE CITY'S LACK OF CONTROL OVER TRAINING AND SUPERVISION DECISIONS CONCERNING THE HANDLING OF BRADY MATERIAL DOES NOT PRECLUDE §1983 LIABILITY, FLIES IN THE FACE OF THIS COURT'S MANDATE IN MONELL AND ITS PROGENY.

At pp. 10-12 of Resp. Br. he cites, inter alia, the sixth circuit's decision in Pembaur v. City of Cincinnati, 746 F.2d 337, 341 (6th Cir., 1984), for the proposition

that the City need not have control over the training and supervision decisions of the DA's Office in order to be found liable for such policies and practices in a §1983 Monell claim. Respondent, however, misconstrued the language of the sixth circuit. The Court therein noted that the lack of control over the sheriff's office by the county's governing body "[did] not necessarily preclude a finding of liability on the part of the County. We must determine whether the nature and duties of the Sheriff are such that his acts may fairly be said to represent the County's official policy with respect to the specific subject matter" Id. at 341 (emphasis added). In short, the sixth circuit's decision did not depart from the fundamental principle, established by Monell and its progeny, that §1983 municipal liability will lie only where responsibility for the policy or practice can be attributed to the municipality. See Pembaur v. City of Cincinnati, 475 U.S. 469, 479.

Respondent's argument misses this critical point. He seeks, instead, to impose liability on the City based upon a theory of respondeat superior, i.e., because the City pays the salary of the district attorney and indemnifies him in tort actions, the City can be held responsible for his actions or failure to act on policy and practice matters (see Resp. Br. at 8-10). It is well-settled, however, that §1983 liability will not lie against a municipality merely on a theory of respondeat superior. Monell v. New York City Department of Social Services, 436 U.S. 658, 691 (1978).

Moreover, payment of the district attorney's salary and indemnification for tortious conduct are not dispositive on the issue of control, particularly where, as here, those responsibilities are mandated by state statute (see N.Y. Co. Law §§53(1), 928, 930, 940. See also N.Y.C. Admin. Code §7-110), and in no way confer any authority upon the City to control how the district attorney runs his office with respect to executing its prosecutorial functions.

Indeed, respondent failed to rebut a single case cited by petitioner for the proposition that, under New York State law, a municipality cannot be held liable for the prosecutorial acts of the district attorney because the City has no control over the manner in which he performs those duties (see Pet. Br. at 20-21 and Resp. Br. at 8-12). Decisions concerning whether information constitutes Brady material and therefore must be turned over to the defense, are clearly an important aspect of a prosecutor's function qua prosecutor.

On the other hand, the essence of §1983 Monell liability is the concept of responsibility, i.e., that a municipality can be held liable either because it has some significant input into choosing a particular policy or practice from among the various alternatives; or it allows certain practices to exist, despite the fact that doing so results in deprivations of constitutional rights. See Pembaur v. City of Cincinnati, supra, 475 U.S. at 478-480.

Here, however, it is the district attorney who has sole responsibility for making the choices of how to train and supervise his staff in carrying out their prosecutorial functions, including, inter alia, recognizing what constitutes Brady material and how to handle such material. The City has absolutely no input into, no influence, and no control over what topics are chosen, or how those topics are taught.

Accordingly, it would be fundamentally unfair, and violative of this Court's decisions in Monell and its progeny, for the City to be subject to liability as the wrongdoers, when the training policies and practices in question are completely out of the City's hands.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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